

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 14 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of

Implementation of the Pay Telephone
Reclassification and Compensation
Provisions of the Telecommunications
Act of 1996

CC Docket No. 96-128

MOTION TO ACCEPT LATE-FILED PLEADING

The Telecommunications Resellers Association ("TRA"), through undersigned counsel, hereby requests that, for good cause shown, the Commission accept TRA's late-filed Comments in the above-captioned proceeding.

TRA experienced logistical difficulties beyond its control related to the filing of the above-referenced Comments on the afternoon of July 13, 1998. As a result, TRA was unable to deliver the Comments to the Office of the Secretary prior to the close of the Commission's official workday.

Grant of TRA's Motion by the Commission would not result in harm to any party to this proceeding since the Comments are being filed on the day immediately following the filing deadline.

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Accordingly, for good cause shown, the Telecommunications Resellers Association requests that the Commission grant TRA's Motion to Accept TRA's Comments in the above-referenced docket.

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Respectfully submitted,

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**TELECOMMUNICATIONS
RESELLERS ASSOCIATION**

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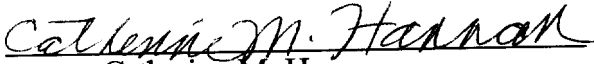
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CERTIFICATE OF SERVICE

I, Catherine M. Hannan, hereby certify that a true and correct copy of the foregoing document has been served by hand this 14th day of July, 1998, on the following:

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Before the
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 Washington, D.C. 20554

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JUL 14 1998

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In The Matter of

**IMPLEMENTATION OF THE PAY
 TELEPHONE RECLASSIFICATION AND
 COMPENSATION PROVISIONS OF THE
 TELECOMMUNICATIONS ACT OF 1996**

CC Docket No. 96-128

**COMMENTS OF THE
 TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to Public Notice, DA 98-1198 (released June 19, 1998) (the "Notice"), hereby submits its comments on selected issues raised by the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in the Court's recent decision remanding the Commission's Second Report and Order, 13 FCC Rcd. 1778 (1997), for further proceedings.² Specifically, TRA herein urges the Commission to rethink several of the fundamental predicates of its widely maligned

¹ A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. The overwhelming majority of TRA's resale carrier members provide interexchange services as a significant part of their expanding service portfolios. Accordingly, TRA's resale carrier members comprise the bulk of the interexchange carriers that must compensate payphone service providers, either directly or indirectly through their underlying network service providers, for originating toll free and access code calls on their facilities.

² MCI Telecommunications Corporation v. FCC, Case No. 97-1675, slip op. (D.C. Cir. May 15, 1998).

payphone compensation mechanism. The payphone compensation scheme adopted by the Commission in implementing the statutory mandate of the Telecommunications Act of 1996 ("Telecommunications Act") "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone[s],"³ not only adversely impacts interexchange carrier ("IXCs"), particularly small IXCs, paging service providers, toll free service subscribers, and ultimately, consumers, but rather than fulfilling its obligation to fairly compensate payphone service providers ("PSPs"), inexplicably provides PSPs (and ultimately the premises owners with which they contract) with a substantial windfall. Having now been twice sharply criticized by the D.C. Circuit for arbitrary and capricious decision making, it is time for the Commission to revisit not only the specific matters for which it was faulted by the Court in its recent decision remanding the *Second Report and Order*, but other equally ill-conceived elements of the current payphone compensation mechanism.

In remanding the *Second Report and Order*, the D.C. Circuit characterized as "plainly inadequate" the Commission's explanation of its derivation of its default per-call payphone compensation rate, rejecting as "utterly unhelpful" the reasoning underlying the Commission's assumption that "the 'market rate' for coinless calls . . . should be the same as the rate for coin calls."⁴ Noting the Commission's acknowledgment that "because of locational monopolies and incomplete information endemic to the payphone market, the coin call rate may potentially diverge from coin call costs," the Court faulted the Commission for merely declaring its confidence that "market forces will keep payphone prices at competitive levels," rather than demonstrating that the

³ 47 U.S.C. § 276; Pub. L. No. 104-104, 110 Stat. 56, § 151 (1996).

⁴ MCI Telecommunications Corporation v. FCC, Case No. 97-1675, slip op. at 4 - 5.

local coin rate reflects "a competitive market in which costs and rate converge."⁵ Given the inadequacy of the Commission's explanations for its actions, the Court afforded the Commission a mere six months to "respond adequately" to its remand.⁶

In an earlier decision, the D.C. Circuit scolded the Commission for "fail[ing] to justify tying the default rate to local coin rates."⁷ Indeed, the Court used terms such as "inexplicable" in rejecting the only grounds offered by the Commission to justify its "market-based" approach to payphone compensation.⁸ Moreover, the Court, in clarifying its decision, suggested that there was "little or no prospect" that the Commission's "market-based" approach could be "readopted upon the basis of a more adequate explanation."⁹

The D.C. Circuit was correct; the Commission's market-based approach to payphone compensation simply cannot be justified. As the Commission has acknowledged, "there are certain locations where, because of the size of the location or the caller's lack of time to identify potential substitute payphones, no 'off-premises' payphone serves as an adequate substitute for an 'on-premises' payphone."¹⁰ The "certain locations" to which the Commission refers unfortunately

⁵ Id. at 5.

⁶ Id. at 7.

⁷ Illinois Public Telecommunications Association v. FCC, 117 F.3d 555, 564, *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997).

⁸ Id.

⁹ 123 F.3d 693 at 693 - 94.

¹⁰ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 20541, ¶ 15(1996), *recon.* 11 FCC Rcd. 21233 (1996), *vacated in part sub nom. Illinois Public Telecommunications Ass'n v. FCC*, 117 F.3d 555, *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997).

represent the bulk of pay telephones. As the Commission has recognized, premises owners generally "contract exclusively with one PSP to establish that PSP as the monopoly provider of payphone service."¹¹ Accordingly, what competition exists for individual PSPs must, as the Commission has acknowledged, come from "payphones at nearby locations."¹² And it is simply not realistic to expect that a consumer, having located a payphone in an airport or a parking garage, or in a restaurant or on the street, will elect not to use that phone because there *might* be another payphone elsewhere that *might* be less expensive. Consumers will not identify multiple payphones at multiple locations before selecting the most cost-effective alternative. Confirming this assessment are the almost universal increases in local coin rates to maximum allowable levels following the Commission's designation of \$0.35 as the default local coin rate, reflecting the ability of PSPs to raise prices virtually at will.

The real competition in the payphone market is among PSPs for access to prime locations. This competition, however, drives upward commissions payable to location providers, not downward rates charged to payphone users. PSPs are not only encouraged, but compelled, as well as enabled, to assess supra-competitive charges by the need to bid for and secure prime locations. Hence, allowing what are effectively mini-monopolists who have out-bid competitors for prime locations to set prices without constraint practically ensures the exploitation of consumers in need of immediate communications access.

Such an approach is problematic with respect to local coin calls; it is entirely unworkable with respect to coinless toll calls. A consumer placing a local call from a payphone

¹¹ Id.

¹² Id.

must assume the costs associated with his or her decision to use that facility. In sharp contrast, a consumer using a payphone to reach a toll free number has no direct monetary interest in the transaction. The latter caller, unlike the former, has no incentive whatsoever to seek out a more affordable alternative for placing his or her call. Hence, whatever minimal market forces are at work in the local coin market are not present with respect to coinless toll calls.

Indeed, tying compensation for coinless toll calls to local coin calls will likely diminish the impact of market forces in the local coin market. Because PSPs have seemingly unlimited flexibility to raise rates for calls as to which the callers have no financial interest, their profitability may well be enhanced by significantly overpricing coinless toll calls even if the result is to depress local coin usage. A market-based approach to payphone compensation hence will likely encourage higher prices for *both* local coin and coinless toll calls, *even if* the market for local coin calls is vigorously competitive, which it is not.

Given these circumstances, the Commission, if it persists in its reliance upon "market-based" payphone compensation, must rely exclusively on IXC blocking of payphone-originated toll free and access code calls to discipline PSP pricing. Given the continuing inability of a significant segment of PSPs to provide IXCs with the payphone-specific coding digits necessary to effectuate such blocking, this approach has proved to be highly problematic.¹³ Worse yet, it has proven to be devastating for specific industry segments, most notably providers of pre-paid calling cards which require "real-time" data to recover the costs of compensating PSPs from the consumers generating

¹³ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Memorandum Opinion and Order), 13 FCC Rcd. 4998 (1998), *pet. for rev. pending sub nom. International Telecard Ass'n v. FCC*, Case No. 98-1291 (D.C. Cir. June 26, 1998).

those costs. Even if these more immediate problems are eventually resolved, blocking of payphone-originated toll free and access code calls by IXC's hardly can be said to be in the public interest. As the D.C. Circuit recognized, "blocking is hardly an ideal option for IXC's, for it is not only expensive to implement . . . but its use invariably will result in a mutual loss of business for *both* the PSPs and the IXC's."¹⁴ Moreover, blocking will not only deny consumers convenient access to many toll free numbers, but it is consumers that will ultimately bear the costs associated with the implementation of blocking.

The short answer then to the Commission's inquiry "whether the local coin rate reflects competitive market conditions and . . . whether costs and rates converge in the coin call market"¹⁵ is no and emphatically no. How then should payphone compensation for coinless toll calls be set. TRA submits that rates for payphone-originated toll free and access code calls should be determined using a forward-looking, economic cost standard. As the Commission has recognized, "economists generally agree that prices based on forward-looking long-run incremental costs (LRIC) give appropriate signals to producers and consumers and ensure efficient entry and utilization of the telecommunications infrastructure."¹⁶ Indeed, the Commission has acknowledged that "a pricing

¹⁴ Illinois Public Telecommunications Association v. FCC, 117 F.3d 555 at 564.

¹⁵ Public Notice, DA 98-1198 at 2.

¹⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 672 - 73 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (1997), *modified* 120 F.3d 820 (8th Cir. 1997), *cert. granted sub. nom. AT&T Corp. v. Iowa Utilities Board* (Nov. 17, 1997), *pet. for rev. pending sub. nom., Southwestern Bell Telephone Co. v. FCC*, Case No. 97-3389 (Sept. 5, 1997), *pet. for cert. pending*.

methodology based on forward-looking, economic cost best replicates, to the extent possible, the conditions of a competitive market," encouraging "efficient levels of investment and entry."¹⁷ And, the Commission has concluded that where market forces are inadequate to discipline pricing decisions, the use of forward-looking economic costs as the basis for setting rates is more consistent with the public interest than market-based pricing.¹⁸ As the Commission has recognized, opportunity cost pricing in an imperfect market will not "drive prices toward competitive levels."¹⁹

Fair compensation does not equate to monopoly rents. Fair compensation means nothing more than the opportunity to recover costs and realize a reasonable return on investment. A forward-looking, economic cost standard would allow PSPs to recover costs, including a reasonable share of common costs, and generate a legitimate profit without exploiting their mini-monopolist status. There is ample evidence in the record that the forward-looking, economic cost of originating toll free and access code calls should not exceed \$0.10 per call.²⁰ Per-call compensation of \$0.10 thus represents fair compensation; \$0.284, accordingly, represents monopoly rents.

TRA, however, strongly encourages the Commission not to limit its actions here to setting rates for completing payphone-originated coinless toll calls at forward-looking, economic

¹⁷ Id. at ¶¶ 672, 679.

¹⁸ Id. at ¶¶ 704 -15.

¹⁹ Id. at ¶¶ 704 -11.

²⁰ Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 (Memorandum Opinion and Order), 13 FCC Rcd. 4998 at ¶¶ 112 - 14.

costs. TRA urges the Commission to explore as well means to mitigate the adverse impacts of its payphone compensation scheme on small carriers. As TRA has repeatedly advised the Commission, small carriers, because of their size and relatively limited financial resources, as well as the unique characteristics of their customer bases, have been disproportionately impacted by the current payphone compensation mechanism. Among carriers, small providers are the least well positioned to pass-through significant cost increases through to their customers, particularly their small business customers. Small business customers tend to be highly resistant to the imposition of additional charges, particularly large, unanticipated assessments. Unfortunately, small carriers, unlike some of their larger network-based competitors, do not have the traffic volumes over which to spread amounts paid to originate toll free or access code calls from payphones without significantly increasing rates. Nor do small carriers have the operating margins within which to absorb such amounts without adversely impacting their financial viability.

To alleviate this problem, TRA urges the Commission to carefully consider the proposal of AirTouch Paging ("AirTouch") to establish a new toll free service which would provide callers toll service free of charge, but treat calls to designated toll free numbers as local coin calls for purposes of compensating PSP for use of their facilities to originate calls to those numbers.²¹ TRA believes that such a new service would allow toll free service subscribers to better control their costs of service, render it easier for carriers to pass through per-call payphone costs to toll free subscribers which had elected not to use the new service, and benefit consumers by minimizing the usage of toll blocking by IXC's. In essence, the AirTouch proposal would treat certain payphone-

²¹ AirTouch Paging Petition for Rulemaking to Establish a Dedicated 8XX Code for Toll-Free Calls Placed from Pay Telephones, RM No. 9273, filed April 17, 1998.

originated toll free and access code calls much like wireless-originated toll free calls are currently treated.

TRA also submits that the Commission should revisit the issue of who should compensate PSPs for use of their facilities to originate toll free and access code calls. Although it initially opposed proposals to require callers initiating toll free and access code calls from payphones to deposit coins in those payphones, TRA now believes that the problems associated with such an approach may be less detrimental than those generated by the Commission's current "carrier-pays" scheme. On the one hand, treating payphone-originated toll free and access code calls as local coin calls will reduce the utility, and hence the value, of toll free and access code services to, and impose increased burdens on, consumers. On the other hand, consumers are ultimately bearing the substantial costs associated with the cumbersome carrier-pays approach. Moreover, if market forces are ever to discipline PSP pricing of payphone-originated toll free and access code calls, the individual making the decision whether to place the call must have a direct financial interest in that decision.

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to modify its mechanism for compensating PSPs for originating toll free and access code calls in a manner consistent with these comments.

Respectfully submitted,

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July 14, 1998

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